

**2012-1356  
(Serial No. 77/660,948)**

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# **In the United States Court of Appeals for the Federal Circuit**

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**IN RE CITY OF HOUSTON**

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**Appeal from the United States Patent and Trademark Office,  
Trademark Trial and Appeal Board.**

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## **JOINT APPENDIX (CORRECTED)**

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Mark G. Chretien  
Ben D. Tobor  
Anthony F. Matheny  
GREENBERG TRAURIG, LLP  
1000 Louisiana Street, Suite 1700  
Houston, Texas 77002  
Telephone: (713) 374-3528  
Facsimile: (713) 754-7528  
Attorneys for Appellant  
City of Houston

Raymond T. Chen  
Christina J. Hieber  
Thomas L. Casagrande  
OFFICE OF THE SOLICITOR  
U.S. Patent and Trademark Office  
Mail Stop 8  
P.O. Box 1450  
Alexandria, VA 22313-1450  
Attorneys for Appellee  
Director of the U.S. Patent &  
Trademark Office

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THIS DECISION IS A  
PRECEDENT OF THE TTAB

Mailed: January 18, 2012

UNITED STATES PATENT AND TRADEMARK OFFICE  
Trademark Trial and Appeal Board

In re City of Houston

Serial No. 77660948  
Filed February 1, 2009

Mark G. Chretien and Ben D. Tobor of Greenberg Traurig LLP  
for applicant.

Sally Shih, Examining Attorney, Law Office 106, Mary I.  
Sparrow, Managing Attorney.

Before Kuhlke, Cataldo, and Mermelstein, Administrative  
Trademark Judges.

Opinion by Mermelstein, Administrative Trademark Judge:

The City of Houston, Texas seeks registration on the  
Principal Register of the following mark:



for "municipal services, namely, promoting trade, commerce,  
economic development and tourism; city administrative  
services, namely, business administration and management of

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"municipality services," in International Class 35; and "municipal services, namely, providing public utilities services," in International Class 39.<sup>1</sup>

Registration has been finally refused on the ground that the mark "includes a governmental insignia of the City of Houston." Trademark Act § 2(b), 15 U.S.C. § 1052(b). Applicant appealed, and the appeal has been fully briefed.

This appeal raises an issue of first impression: Does Trademark Act § 2(b) bar registration when the applicant is a government entity seeking to register as a service mark its own flag, coat of arms, or other insignia? We conclude that it does, and we accordingly affirm the refusal to register.<sup>2</sup>

#### I. Preliminary Issues

Applicant attached several exhibits to its opening

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<sup>1</sup> The application is based on an allegation of first use and use in commerce as of February 1, 2009, for both classes. Applicant has disclaimed the exclusive right to use "CITY OF HOUSTON TEXAS" apart from the mark as shown. The application contains the following description of the mark:

- The mark consists of a circular seal having a rope pattern contour with a design of a plow, a locomotive and a five pointed Texas star, and the wording "CITY OF HOUSTON TEXAS" within the seal and a fleur de lis on each side of the term "TEXAS".

<sup>2</sup> We also decide today *In re Gov't of the Dist. of Columbia*, USPQ2d \_\_, App. No. 77643857 (TTAB Jan. 18, 2012), involving similar legal issues.

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brief on appeal,<sup>3</sup> and in its brief listed thirteen third-party registrations in support of its argument. See App. Br. at 10. Copies of the thirteen listed registrations were attached to applicant's reply brief. In her brief on appeal, the examining attorney objected to consideration of both the listed third-party registrations and the other evidence attached to applicant's brief, on the ground that neither were timely, and that the list of registrations was insufficient to make them of record. Ex. App. Br. at 6.

The examining attorney's objection to the exhibits to applicant's opening brief is overruled. All of this material was submitted during examination, in connection with applicant's June 18, 2010, response to an Office action. While there was no need to attach additional copies to applicant's appeal brief, *Life Zone Inc. v. Middleman Group Inc.*, 87 USPQ2d 1953, 1955 (TTAB 2008) (evidence attached to briefs will almost always be either untimely or duplicative, and in either event should not be filed), striking this material would be pointless as it is already properly of record.

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<sup>3</sup> The exhibits to applicant's brief consisted of a copy of Trademark Act § 2 (Exh. A); a copy of the Trademark Act of 1905, § 5 (Exh. B); two pages of what appear to be errata pertaining to a law journal article, *Flags and Seals of Texas*, 33 S. Tex. L. Rev. 215, pp. vi-vii (1992) (Exh. C); and an excerpt from a book, SCOT M. GUENTER, *THE AMERICAN FLAG, 1777-1924*, 132-153, 228-233 (1990) (Exh. D).

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With respect to the list of thirteen third-party registrations set out in applicant's opening brief and the copies of those registrations attached to applicant's reply brief, we note that those same registrations were listed<sup>4</sup> in applicant's June 18, 2010, response to an Office action. In her final refusal, the examining attorney neither discussed applicant's listed registrations, nor did she inform applicant that a mere list was not a proper means to introduce registrations into the record.<sup>5</sup>

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<sup>4</sup> Only the registration number and literal elements of the marks appear in applicant's lists; any design elements in the marks were not set out in either applicant's response to the Office action or in applicant's opening brief, nor is other information such as the names of the registrants provided.

<sup>5</sup> It is well-established that in order to make third-party registrations properly of record, "applicant should submit copies of the registrations themselves, or the electronic equivalent thereof" from the USPTO's electronic databases, now known as TARR or TESS. *In re Broadway Chicken Inc.*, 38 USPQ2d 1559, 1560 n.6 (TTAB 1996) (citing *In re Smith and Mehaffey*, 31 USPQ2d 1531 (TTAB 1994)). Such submissions should be made prior to appeal or, if after appeal, pursuant to a remand of the matter to the examining attorney for further examination. Trademark Rule 2.142(d).

Records of registrations can change over time. The requirement for submission of copies of cited third-party registrations provides a definitive record for the USPTO to review, both during examination and upon appeal to the Board, and provides clear notice to interested parties and the public of the record upon which an administrative decision regarding registrability was made. Similarly, the USPTO must provide a complete record of a proceeding for any reviewing court. See 35 U.S.C. § 143 ("[T]he Director shall transmit to the United States Court of Appeals for the Federal Circuit a certified list of the documents comprising the record in the Patent and Trademark Office. The court may request that the Director forward the original or certified copies of such documents during pendency of the appeal."); Trademark Rule 2.191. Submission of copies of

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We find that the examining attorney's failure to advise applicant of the insufficiency of the list of registrations when it was proffered during examination constituted a waiver of any objection to consideration of that list. Accordingly, we will consider the same list of registrations set out in applicant's opening brief "for whatever limited probative value such evidence may have."

*In re Broyhill Furniture Indus. Inc.*, 60 USPQ2d 1511, 1513, n.3 (TTAB 2001).

We reach a different conclusion with respect to the copies of applicant's thirteen listed third-party registrations attached to its reply brief. "The record in the application should be complete prior to the filing of an appeal. The ... Board will ordinarily not consider additional evidence filed with the Board by the appellant or by the examiner after the appeal is filed." Trademark Rule 2.142(d). This is especially true with respect to evidence submitted for the first time with a reply brief, to which the examining attorney may not respond. *In re Zanova Inc.*, 59 USPQ2d 1300, 1302 (TTAB 2001) ("By attempting to introduce evidence with its reply brief, applicant has effectively shielded this material from

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cited registrations enables the USPTO to fulfill its responsibility to a reviewing court in the event of an appeal.

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review and response by the Examining Attorney."). If applicant wished to submit proper evidence of its third-party registrations after filing its appeal, it should have requested a remand for that purpose, which - if granted<sup>6</sup> - would have given the examining attorney an opportunity to examine the new evidence and respond to it appropriately. Trademark Rule 2.142(d). Applicant having failed to do so, we find the evidence submitted with applicant's reply brief "manifestly untimely," and we have not considered it.<sup>7</sup> In

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<sup>6</sup> We do not suggest that such a request would have been granted. A request for remand will only be granted upon a showing of good cause. See generally, TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE ("TBMP"), § 1207.02 (3d ed. 2011) (and cases cited therein). Whether good cause has been demonstrated will depend, *inter alia*, on the point in the appeal at which the request is made and the reason for the delay in submitting the evidence.

<sup>7</sup> Applicant argues that the evidence attached to its reply brief should be considered because the examining attorney failed to object to its list of registrations submitted during examination. Reply Br. at 3-4 (citing *Broyhill*, 60 USPQ2d at 1513 n.3). Applicant misreads *Broyhill*. That case did not permit submission of proper evidence of the listed registrations with *Broyhill*'s brief, let alone its reply brief. In *Broyhill*, "the sole evidence cited by applicant ... [was] a list of five third-party registrations." 60 USPQ2d at 1513 (emphasis added). Upon the examining attorney's objection in her brief to "such evidence," i.e., the list, we held the objection waived, *id.* at n.3, and considered "applicant's evidence regarding ... third-party registrations ... for whatever limited probative value such evidence may have." *Id.* The waiver in *Broyhill* was thus limited to the evidence which was improperly submitted during examination but not objected to - *Broyhill*'s list of registrations. See also *In re Dos Padres Inc.*, 49 USPQ2d 1860, 1861 n.2 (TTAB 1998).

In this case, the examining attorney's failure to object during examination constituted a waiver of objection only to the evidence which was improperly submitted during examination, namely, the list of registrations. The absence of an objection to the list was not a waiver of any objection to the future untimely submission of the registrations with applicant's brief

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re *Petroglyph Games Inc.*, 91 USPQ2d 1332, 1334 (TTAB 2009).

**II. Interpretation of Trademark Act § 2(b)**

**A. Statutory Provisions**

The relevant statutory language provides as follows:

No trademark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration on the principal register on account of its nature unless it-

...

Consists of or comprises the flag or coat of arms or other insignia of the United States, or of any State or municipality, or of any foreign nation,<sup>[8]</sup> or any simulation thereof.

Trademark Act § 2(b); 15 U.S.C. § 1052(b).

The quoted provision is substantially similar to a provision of the earlier Trademark Act of 1905, which read as follows:

[N]o mark by which the goods of the owner of the mark may be distinguished from other goods of the same class shall be refused registration as a trade-mark on account of the nature of such mark unless such mark

...

Consists of or comprises the flag or coat of arms or other insignia of the United States or any simulation thereof, or of any State or

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or reply brief. Our consideration of these third-party registrations is thus limited to the information which applicant listed at page 8 of its June 18, 2010, Office action response (and which is repeated at page 10 of its opening brief).

<sup>8</sup> For ease of reference, we refer generally to "the flag or coat of arms or other insignia of the United States or of any State or municipality, or of any foreign nation" (and to their equivalent in the 1905 statute and the Paris Convention) as governmental or official insignia.

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municipality or of any foreign nation....

Trademark Act of 1905, § 5, ch. 592 § 5, 33 Stat. 724 (1905) (repealed 1946).

**B. Construction**

As explained at greater length in *District of Columbia*,

[w]e find the quoted language of the current statute - and that of its predecessor - to be plain and clear on its face. Reversing the negative syntax of Section 2, we read the quoted subsection to bar registration of any mark which is or includes the "coat of arms or other insignia of ... any ... municipality." While the text does not resolve all definitional issues (i.e., what constitutes "other insignia" or a "simulation"), those questions are not at issue in this case. Further, we find the statute to be uniform in its applicability. The text of the statute offers no exception to the prohibition on registration, even when a governmental entity applies to register its own official insignia.

Slip op. at 12-13 (footnote omitted).

Applicant argues that "Trademark Act Section 2(b) is silent as to whether or not countries, states, or municipalities may register their own insignia." App. Br. at 6. We disagree. While it is true that Section 2(b) does not explicitly answer applicant's narrow question, it clearly provides an answer because it requires refusal of registration when the applied-for mark "consists of comprises the flag or coat of arms or other insignia of ... any ... municipality." The statute is not "silent" as to

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whether a municipality may register its own official insignia - it provides that all such marks are to be refused. The specific statement that applicant finds missing in the statutory language is simply unnecessary to its interpretation, because the prohibition on the registration of all official insignia resolves the question of whether *some* official insignia may be registered. Under any theory of interpretation, a categorical statement is not incomplete or unclear merely because it does not explicitly set out every element or subset of the category, and the language of Trademark Act § 2(b) is no exception. There is absolutely nothing in the statute itself which hints of a different result.

Accordingly, we find that Trademark Act § 2(b) on its face bars registration of all official insignia, regardless of the identity of the applicant.

### III. Applicant's Arguments

Notwithstanding what appears to be the clear meaning of the statutory provision at issue, applicant raises three points in arguing for reversal of the refusal to register:

- (i) the statutory language should be construed to allow a city to register its own official seal to identify municipal services that the city provides to its citizens under the seal;
- (ii) Applicant is seeking registration for its city seal for use in connection with services

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provided by the Applicant, and not as an "emblem of national authority"; and

(iii) at least thirteen ... other cities have been allowed to register their city seals, with at least one ... of these registrations issuing after Applicant's mark had been rejected.

App. Br. at 3.

**A. Origin of Trademark Act § 2(b)**

Noting that what is now Trademark Act § 2(b) first appeared in substantially similar form as § 5 of the Trademark Act of 1905, applicant hypothesizes that the provision "was enacted to prevent desecration of the flag, coat of arms or related symbols by halting the registration of commercial trademarks that contained representations of those marks." App. Br. at 7. Applicant claims that "[t]he original statute was not intended to prevent the relevant states, countries, or municipalities from protecting their own insignia. Instead, the purpose was the exact opposite, to protect the states, countries, or municipalities from having their insignia misappropriated or used for improper commercial purposes by private individuals or entities."

App. Br. at 8.

While we are unable to conclusively verify applicant's theory as to the origin of Trademark Act § 2(b),<sup>9</sup> it makes

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<sup>9</sup> As authority for its hypothesis, applicant cites a footnote in a law review article, *Flags and Seals of Texas*, 33 S. Tex. L.

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little difference. Even if we accept the premise that Trademark Act § 2(b) was intended to prevent commercial exploitation of the flag (and other official indicia), it does not necessarily follow that Congress intended that governments should be allowed to register their own official insignia. Rather - assuming applicant's premise - it would appear that Congress instead opted to prevent

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Rev. 215 (1992), which in turn cites a book, SCOT M. GUENTER, THE AMERICAN FLAG, 1777-1924, 138-39 (1990), for the proposition that "[t]he 1905 trademark statute was the earliest federal flag-protection law. It was enacted to prevent desecration of the flag, coat of arms, and related symbols by halting the registration of commercial trademarks that contained representations of those marks." 33 S. Tex. L. Rev. at 238 n. 73.5; see App. Br. at 7-8.

However, the excerpts from Guenter's book which applicant has submitted do not entirely support applicant's theory of the genesis of Trademark Act § 2(b). Guenter describes the rise of patriotic fervor in the waning years of the nineteenth century and the rise of what he refers to as the "cult of the flag," fanned by nationalistic movements and the formation of hereditary societies and other patriotic organizations. Many members of such organizations were dismayed by the commercial exploitation of the U.S. flag, and lobbied for both state and federal laws against such use. Nonetheless, while these groups enjoyed some legislative success at the state level, and some success in courts and other tribunals, see *Dist. of Columbia*, slip op. n. 14, Guenter notes that they were rebuffed in their efforts to have their desired federal legislation passed. Indeed, in the excerpt submitted by applicant, Guenter makes no mention at all of the Trademark Act of 1905 or the provision which ultimately became Section 2(b) of the current Act.

Thus, while Guenter's "cult of the flag" was quite likely supportive of the ultimate adoption of § 5 of the Trademark Act of 1905, applicant's authorities provide no direct support for the notion that Trademark Act § 2(b) originated as a flag desecration statute. We note that the applicant in *District of Columbia* presents an alternative history of Section 2(b). See *id.* slip op. at 17-24. Ultimately, we find it unnecessary to definitively determine the origins of Trademark Act § 2(b) because it makes no difference; under either theory we would reach the same result.

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commercial exploitation of such insignia by a complete ban on registration for any use of such indicia in commerce. That is the plain meaning of the legislation which was enacted.

Trademark law is fundamentally about the use of marks in commerce. If the motivation behind Section 5 of the Trademark Act of 1905 was indeed concern over commercial exploitation of the flag and other official insignia, it would have been logical to ban all registrations of official insignia, even if the commercial use involved is by the government itself.

While applicant might be of the opinion that Congress employed a larger hammer than necessary to hit that particular nail, we are not in the business of rewriting statutes to more narrowly effect what we suppose might have been Congress' intention. We must presume, of course, that Congress knew what it was doing when it drafted Section 5 of the Trademark Act of 1905 and later Section 2(b) of the 1946 Act. *United States v. Goldenberg*, 168 U.S. 95, 102-03 (1897). And if that statutory language is clear - as we find it to be in this case - there is a "strong presumption that the plain language of the statute[] expresses congressional intent [which] is rebutted only in rare and

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exceptional circumstances."<sup>10</sup> *United States v. Clintwood Elkhorn Mining Co.*, 553 U.S. 1, 11 (2008).

In this case, the statutory language at issue clearly indicates that all marks which "[c]onsist[] of or comprise[] the flag or coat of arms or other insignia of the United States, or of any State or municipality, or of any foreign nation, or any simulation thereof" are to be refused registration. The statute does not provide for any exception to the rule, although one could easily have been written had it been intended to apply. We accordingly presume that Congress intended the prohibition on registration of official insignia to apply universally, without regard to the identity of the applicant.

**B. Applicant's Use of its Official Seal**

Applicant emphasizes that it "is not seeking to register its City Seal as an 'emblem of authority.' Instead, it is seeking to register the City Seal in connection with specific municipal services that it provides to its citizens via its various City departments."

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<sup>10</sup> We note that applicant has cited no discussion in legislative hearings, speeches, committee reports, or the like of this provision in the legislative history of either Section 5 of the 1905 Act or the current Trademark Act § 2(b), and we have not been able to find any. Whatever may be argued about the role of legislative history in interpreting statutory language, there is nothing in the history of this legislation which clearly suggests an interpretation of Trademark Act § 2(b) contrary to its clear language.

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App. Br. at 9. Applicant argues that "insignia which are 'merely used to identify a service or facility of the Government' do not fall within the general prohibitions of the statute." *Id.* (citing *In re United States Dep't of the Interior*, 142 USPQ 506 (TTAB 1964)).

Applicant seeks registration of its official seal for use in connection with "municipal services, namely, promoting trade, commerce, economic development and tourism; city administrative services, namely, business administration and management of municipality services," in International Class 35; and "municipal services, namely, providing public utilities services," in International Class 39. The application thus identifies a number of activities in which governments typically engage.<sup>11</sup> However, applicant misreads *Department of the Interior* to the extent it finds support in that case for the contention that the nature of the goods and services identified in the application is a factor in determining whether Trademark Act § 2(b) prohibits registration of official insignia. Neither the statute nor *Department of the Interior* makes such a distinction.

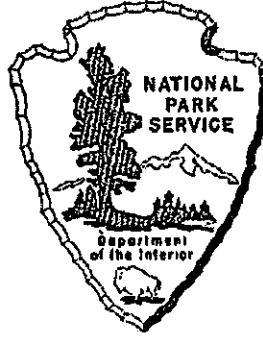
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<sup>11</sup> The services recited in this case differ in this regard from the goods identified in the application at issue in *District of Columbia*. In that case, the identified goods appear to be in the nature of commercial merchandise. *Dist. of Columbia*, slip op. at 2-3.

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*In re U.S. Department of the Interior involved an application to register the following mark used by the Department in connection with*

(1) Operation and maintenance of recreational and educational facilities in connection with parks, monuments, camp sites, trails, museums and similar institutions, and (2) Making available to the public publications and other informational material in connection with the activities of (1).



Registration was refused under Trademark Act § 2(b). On appeal, "[t]he question for determination ... [was] whether the insignia of the 'National Park Service,' here sought to be registered, falls within the category of 'or other insignia' prohibited by Section 2(b)." *Id.*, 142 USPQ at 507. After analyzing the text of the statute, the Board construed Trademark Act § 2(b) to prohibit registration of insignia of the same general class as "the flag or coats of arms" of the United States. Since both the flag and coat or [sic] arms are emblems of national authority it seems evident that other insignia of national authority such as the Great Seal of the United States, the Presidential Seal, and seals of government departments would be equally prohibited registration under Section 2(b).

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*Id.*

The Board found that the applied-for mark was not similar in kind to emblems of governmental authority such as the flag or Great Seal of the United States. The proper analysis thus focuses on the nature of the mark at issue.

Nonetheless, applicant seizes on the final sentence of the case, which directly follows the language quoted above: "On the other hand, it appears equally evident that department insignia which are merely used to identify a service or facility of the Government are not insignia of national authority and that they therefore do not fall within the general prohibitions of this section of the Statute." *Id.* Applicant contends that "it is seeking to register the City Seal in connection with specific municipal services that it provides to its citizens. ... These permitted uses do not fall within the narrowly defined prohibitions of the statute set forth in the case law." App. Br. at 9.

We do not construe the final sentence in *Department of the Interior* as indicating that the applicability of Trademark Act § 2(b) to official insignia depends on the goods or services recited in the application. The statute says no such thing, and the panel in *Department of the Interior* did not even hint at any authority or rationale

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for such a rule. Indeed, until this last sentence, the decision did not in any way discuss the relevance of the goods or services to the determination of whether registration is prohibited under Trademark Act § 2(b). The decision focused instead on the mark itself and whether it was akin to "the flag or coat of arms ... of the United States."

It is thus the nature and status of the applied-for mark that invokes the prohibition of § 2(b). We understand the final sentence of *Department of the Interior* to simply recognize that sometimes resort to consideration of the use of the applied-for mark by the relevant government entity may be necessary in determining whether the mark is in fact "the flag or coat of arms or other insignia" of that government. Although *Department of the Interior* makes clear that the statute prohibits registration of "emblems of ... authority" on a par with the Great Seal of the United States, the question of whether an applied-for trademark meets that definition may not always be determined simply by looking at the mark itself. Thus if the evidence demonstrates that the relevant authority uses the applied-for mark as an official insignia, it should be accorded such status under the Trademark Act. However, if the applied-for mark is never used as an emblem of

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authority, but instead is merely used to identify some service or program provided by a government agency, the mark would not fall within the meaning of "other insignia" and should not be refused under Trademark Act § 2(b).<sup>12</sup> But however the conclusion is reached, once it is determined that the applied-for mark is the official insignia of "the United States, ... any state or municipality, or of any foreign nation," its registration is prohibited, regardless of the specific goods or services for which registration is sought.

In this case, we are constrained to determine that the City of Houston's applied-for mark is such an official insignia, barred from registration under Section 2(b). Applicant clearly admitted throughout examination and in its briefs that the subject of its application is the city's official seal. E.g., Application (Feb. 1, 2009) ("The mark consists of the official seal of the City of Houston, Texas."); Req. for Recon. at 2 (June 18, 2010) ("Applicant's mark is the City Seal ... for the City of Houston, Texas"); App. Br. at 3 ("Applicant is seeking

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<sup>12</sup> In *Department of the Interior*, the mark was actually used in connection with the provision of recreational and educational services in public parks, and not as something akin to an official seal of the government. The Board took pains to emphasize that nothing in Trademark Act § 2(b) should be read as a general prohibition on the registration of any trademarks by governments. *Dep't of the Interior*, 142 USPQ at 506-07.

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registration for its city seal"). Therefore, in determining whether the subject application is for a mark described in Section 2(b), we have no need to examine applicant's actual use of its seal, or a statute or other evidence of whether applicant adopted the applied-for mark as an official "emblem of authority."<sup>13</sup>

Finally, we think it obvious that whether the mark is an official insignia is not determined (or limited) by the goods or services for which application is sought. Thus, the fact that applicant seeks registration for use of its official seal in connection with certain identified services is not particularly probative of whether the seal is, in fact, a "flag or coat of arms or other insignia" under the statute. Once the status of the mark as an official insignia is established, it does not matter what else the mark may be used for, and Trademark Act § 2(b) cannot be avoided simply by limiting the application to certain goods or services.<sup>14</sup> Trademark Act § 2(b) requires

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<sup>13</sup> We further note that there is no dispute that applicant is a "municipality," within the meaning of Trademark Act § 2(b). A "municipality" is "[a] legally incorporated or duly authorized association of inhabitants of limited area for local governmental or other public purposes." BLACK'S LAW DICTIONARY, 918 (5th ed. 1979), of which we take judicial notice.

<sup>14</sup> A contrary rule would permit precisely the type of harm that applicant argues Trademark Act § 2(b) was intended to prevent, namely, commercialization of the government's emblems of authority. By way of example, under the statute the Great Seal of the United States is not registrable as a trademark, even by

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refusal of registration when the mark "consists of or comprises the flag or coat of arms or other insignia of the United States, or of any State or municipality, or of any foreign nation," regardless of the particular goods or services for which registration is sought.

**C. Allegedly Inconsistent Registrations**

Finally, we consider applicant's argument that registration should be allowed because "at least thirteen ... other cities have been allowed to register their city seals."

Applicant submitted a list of thirteen registrations in support of this argument. Although we will consider this evidence, it has very little probative value. As noted, applicant's list consists only of marks and registration numbers. This evidence is incomplete, at best, as it sets out only the wording in the listed marks, without displaying the owner of the registration, any design elements, disclaimers, or other possibly relevant data. More importantly, however, there is no evidence in this record that the listed registrations are, in fact, the official seals of the cities mentioned in the marks.

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the United States government, and it makes no difference at all whether registration is sought for the services of "managing a national government" or "operation of recreational facilities in parks" or - as in the parallel case - "cuff links, mugs, and sweat pants."

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Except to the extent prohibited by Trademark Act § 2(b), cities are clearly permitted to apply for and own trademarks, as are states and national governments. *Dep't of the Interior*, 142 USPQ at 506 ("the granting of trademark and service mark registrations to state and governmental agencies does not appear to be contrary to the established policy of the Patent [and Trademark] Office"). We cannot presume simply from the fact that the marks include words such as CITY OF FULLERTON CALIFORNIA, Reg. No. 2,877,383, or CITY OF MIAMISBURG OHIO'S STAR CITY, Reg. No. 2,522,124, that the listed marks are in fact the official emblems of authority of the named cities.

But even if we were to assume that all of the listed registrations are inconsistent with the examining attorney's refusal in this case, reversal is not required. As noted at the outset, the issue we decide today is one of first impression with the Board. As applicant recognizes, App. Br. at 11, it is well-settled that we are not bound by the decisions of examining attorneys, nor do applicants have a substantive right to consistency. *In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001); see also *In re Rodale Inc.*, 80 USPQ2d 1696, 1700 (TTAB 2006) ("Although consistency in examination is a goal of the Office, the decisions of previous Trademark

Serial No. 77660948

Examining Attorneys are not binding on us, and we must decide each case based on the evidence presented in the record before us"); *In re Finisair Corp.*, 78 USPQ2d 1618, 1621 (TTAB 2006); *In re Wilson*, 57 USPQ2d 1863 (TTAB 2001) (administrative law doctrine of "reasoned decisionmaking" does not require consistent treatment of applications to register marks; each application for registration must be considered on its own record and merits).

Nonetheless, applicant attempts to limit this principle to "issues involving subjective determinations."

[T]he present case is not one that hinges on a subjective determination of, for example, likelihood of confusion, where previous decisions with different facts may not be directly applicable and reliance on the findings of these previous decisions would not be warranted. Instead, this case deals with the non-subjective, straight-forward application of a statute, which should be applied uniformly to all applicants.

App. Br. at 11.

We agree, of course, that a legal determination such as whether Trademark Act § 2(b) applies to applicant's attempt to register its own official seal should be applied consistently. However, our obligation is to make such a decision correctly, and we may not abdicate that responsibility to examining attorneys who made determinations in earlier applications. To the contrary, it is the Board which must correct examining attorneys if

Serial No. 77660948

they have applied an incorrect legal standard in a case that comes before us.<sup>15</sup> The third-party registrations noted by applicant here are not at issue, and in any event, there is far too little information on this record to determine anything relevant about their registration.<sup>16</sup> But as the Court of Appeals for the Federal Circuit noted, "[e]ven if all of the third-party registrations should have been refused registration ..., such errors do not bind the USPTO to improperly register Applicant's marks." *In re Shinnecock Smoke Shop*, 571 F.2d 1171, 91 USPQ2d 1218, 1221 (Fed. Cir. 2009) (citing *In re Boulevard Entm't*, 334 F.3d 1336, 67 USPQ2d 1475, 1480 (Fed. Cir. 2003)).

#### IV. Conclusion

We have carefully considered all of applicant's evidence and arguments in favor of registration. Nonetheless, for the reasons we have discussed, we conclude that Trademark Act § 2(b) prohibits without exception the registration of marks which "[c]onsist[] of or comprise[] the flag or coat of arms or other insignia of the United States, or of any State or municipality, or of any foreign

---

<sup>15</sup> Indeed, we expect that a clear decision on this legal issue will promote the goal of consistency. As noted, we have not heretofore had the occasion to rule on this issue.

<sup>16</sup> Only the mark in the subject application is before us today. Nothing in this decision should be read as an opinion on the registrability of any other mark or the validity of any registration noted by applicant.

**Serial No. 77660948**

nation." We further conclude that applicant's official seal as depicted in the subject application is such a mark, and that registration is therefore barred by statute.

Applicant argues that Congress did not intend such a result, although it provides no clear indication that Congress intended anything other than what the statute clearly provides. Because we find the language of Trademark Act § 2(b) clear on the question presented, we have neither the authority nor a basis to deviate from its terms. Applicant and others in its position are free, of course, to pursue a legislative solution, but we are without authority to write an exception into the statute.

**Decision:** The refusal to register is AFFIRMED.

Form PTO 55 (12-80)

**U.S. DEPARTMENT OF COMMERCE  
United States Patent and Trademark Office**

April 25, 2012

(Date)

**THIS IS TO CERTIFY** that the annexed is an accurate statement of the content entries in the file of the trademark application identified below. Information in the statement was collected from the TTABvue and TRAM electronic databases of this Office. It lists the papers comprising the record before the United States Patent and Trademark Office.

**The Trademark Application of:**

**Applicant: City of Houston**

**Application No.: 77/660,948**

**Date Filed: February 1, 2009**

**Mark : CITY OF HOUSTON TEXAS and design**

By authority of the  
DIRECTOR OF THE UNITED STATES  
PATENT AND TRADEMARK OFFICE

*Macia L. Fletcher*  
Certifying Officer

## PROSECUTION HISTORY for Serial No. 77/660,948

DATE	DESCRIPTION
02/01/2009	APPLICATION
02/05/2009	NOTICE OF DESIGN SEARCH CODE
04/21/2009	NON-FINAL ACTION
10/23/2009	RESPONSE TO NON-FINAL ACTION
11/18/2009	APPROVED FOR PUBLICATION - PRINCIPAL REGISTER
12/17/2009	NON-FINAL ACTION
06/18/2010	RESPONSE TO NON-FINAL ACTION
07/21/2010	FINAL REFUSAL
01/14/2011	NOTICE OF APPEAL
01/18/2011	APPEAL ACKNOWLEDGED
03/15/2011	APPLICANT'S APPEAL BRIEF
03/15/2011	APPEAL FORWARDED TO EXAMINER FOR BRIEF
04/20/2011	EXAMINING ATTORNEY'S APPEAL BRIEF
05/09/2011	APPLICANT'S REPLY BRIEF
05/09/2011	MEMO FORWARDING REPLY BRIEF
01/18/2012	BOARD'S DECISION: AFFIRMED
03/16/2012	APPEAL TO CAFC

**Trademark/Service Mark Application, Principal Register****Serial Number: 77660948****Filing Date: 02/01/2009****The table below presents the data as entered.**

Input Field	Entered
<b>SERIAL NUMBER</b>	77660948
<b>MARK INFORMATION</b>	
*MARK	\\\TICRS\\EXPORTS\\IMAGEOUTS\\776\\609\\77660948\\xml\\AP\\P002.JPG
<b>SPECIAL FORM</b>	YES
USPTO-GENERATED IMAGE	NO
LITERAL ELEMENT	City of Houston Texas
COLOR MARK	NO
*DESCRIPTION OF THE MARK (and Color Location, if applicable)	The mark consists of the official seal of the City of Houston, Texas.
PIXEL COUNT ACCEPTABLE	YES
PIXEL COUNT	600 x 606
<b>REGISTER</b>	Principal
<b>APPLICANT INFORMATION</b>	
*OWNER OF MARK	City of Houston
*STREET	901 Bagby
*CITY	Houston
*STATE (Required for U.S. applicants)	Texas

*COUNTRY	United States
*ZIP/POSTAL CODE (Required for U.S. applicants only)	77002
<b>LEGAL ENTITY INFORMATION</b>	
TYPE	municipal corporation
STATE/COUNTRY WHERE LEGALLY ORGANIZED	Texas
<b>GOODS AND/OR SERVICES AND BASIS INFORMATION</b>	
*INTERNATIONAL CLASS	035
*IDENTIFICATION	municipal services, namely, promoting trade, commerce, economic development and tourism
FILING BASIS	SECTION 1(a)
FIRST USE ANYWHERE DATE	At least as early as 02/01/2009
FIRST USE IN COMMERCE DATE	At least as early as 02/01/2009
<b>SPECIMEN FILE NAME(S)</b>	
ORIGINAL PDF FILE	<u>spec-7220138196-222010627 . city seal specimen.pdf</u>
CONVERTED PDF FILE(S) (7 pages)	<u>\TICRS\EXPORT5\IMAGEOUT5\776\609\77660948\xml1\APP0003.JPG</u> <u>\TICRS\EXPORT5\IMAGEOUT5\776\609\77660948\xml1\APP0004.JPG</u> <u>\TICRS\EXPORT5\IMAGEOUT5\776\609\77660948\xml1\APP0005.JPG</u> <u>\TICRS\EXPORT5\IMAGEOUT5\776\609\77660948\xml1\APP0006.JPG</u> <u>\TICRS\EXPORT5\IMAGEOUT5\776\609\77660948\xml1\APP0007.JPG</u> <u>\TICRS\EXPORT5\IMAGEOUT5\776\609\77660948\xml1\APP0008.JPG</u> <u>\TICRS\EXPORT5\IMAGEOUT5\776\609\77660948\xml1\APP0009.JPG</u>
SPECIMEN DESCRIPTION	Screenshot from Applicant's Internet website displaying the mark and advertising the services
*INTERNATIONAL	039

<b>CLASS</b>	
<b>IDENTIFICATION</b>	municipal services, namely, providing city administration and public utilities services
<b>FILING BASIS</b>	SECTION 1(a)
<b>FIRST USE ANYWHERE DATE</b>	At least as early as 02/01/2009
<b>FIRST USE IN COMMERCE DATE</b>	At least as early as 02/01/2009
<b>SPECIMEN FILE NAME(S)</b>	
<b>ORIGINAL PDF FILE</b>	<u>spec-7220138196-222010627 . city seal specimen.pdf</u>
<b>CONVERTED PDF FILE(S) (7 pages)</b>	<u>\TICRS\EXPORT5\IMAGEOUT5\776\609\77660948\xml1\APP0003.JPG</u> <u>\TICRS\EXPORT5\IMAGEOUT5\776\609\77660948\xml1\APP0004.JPG</u> <u>\TICRS\EXPORT5\IMAGEOUT5\776\609\77660948\xml1\APP0005.JPG</u> <u>\TICRS\EXPORT5\IMAGEOUT5\776\609\77660948\xml1\APP0006.JPG</u> <u>\TICRS\EXPORT5\IMAGEOUT5\776\609\77660948\xml1\APP0007.JPG</u> <u>\TICRS\EXPORT5\IMAGEOUT5\776\609\77660948\xml1\APP0008.JPG</u> <u>\TICRS\EXPORT5\IMAGEOUT5\776\609\77660948\xml1\APP0009.JPG</u>
<b>SPECIMEN DESCRIPTION</b>	Screenshot from Applicant's Internet website displaying the mark and advertising the services
<b>ATTORNEY INFORMATION</b>	
<b>NAME</b>	Mark G. Chretien
<b>ATTORNEY DOCKET NUMBER</b>	116673.010100
<b>FIRM NAME</b>	Greenberg Traurig LLP
<b>STREET</b>	1000 Louisiana
<b>INTERNAL ADDRESS</b>	Suite 1700
<b>CITY</b>	Houston
<b>STATE</b>	Texas
<b>COUNTRY</b>	United States
<b>ZIP/POSTAL</b>	77002

<b>CODE</b>	
<b>PHONE</b>	713-374-3528
<b>FAX</b>	713-754-7528
<b>OTHER APPOINTED ATTORNEY</b>	Ben D. Tobor, Anthony F. Matheny and Jason P. Sander
<b>CORRESPONDENCE INFORMATION</b>	
<b>NAME</b>	Mark G. Chretien
<b>FIRM NAME</b>	Greenberg Traurig LLP
<b>STREET</b>	1000 Louisiana
<b>INTERNAL ADDRESS</b>	Suite 1700
<b>CITY</b>	Houston
<b>STATE</b>	Texas
<b>COUNTRY</b>	United States
<b>ZIP/POSTAL CODE</b>	77002
<b>PHONE</b>	713-374-3528
<b>FAX</b>	713-754-7528
<b>FEES INFORMATION</b>	
<b>NUMBER OF CLASSES</b>	2
<b>FEES PER CLASS</b>	325
<b>*TOTAL FEE DUE</b>	650
<b>*TOTAL FEE PAID</b>	650
<b>SIGNATURE INFORMATION</b>	
<b>SIGNATURE</b>	/mgc/
<b>SIGNATORY'S NAME</b>	Mark G. Chretien
<b>SIGNATORY'S POSITION</b>	Attorney of record, Texas bar member
<b>DATE SIGNED</b>	02/01/2009

## Trademark/Service Mark Application, Principal Register

**Serial Number: 77660948**  
**Filing Date: 02/01/2009**

### To the Commissioner for Trademarks:

**MARK:** City of Houston Texas (stylized and/or with design, see mark)

The literal element of the mark consists of City of Houston Texas.

The mark consists of the official seal of the City of Houston, Texas.

The applicant, City of Houston, a municipal corporation legally organized under the laws of Texas, having an address of

901 Bagby  
Houston, Texas 77002  
United States

requests registration of the trademark/service mark identified above in the United States Patent and Trademark Office on the Principal Register established by the Act of July 5, 1946 (15 U.S.C. Section 1051 et seq.), as amended.

International Class 035: municipal services, namely, promoting trade, commerce, economic development and tourism

Use in Commerce: The applicant is using the mark in commerce, or the applicant's related company or licensee is using the mark in commerce, or the applicant's predecessor in interest used the mark in commerce, on or in connection with the identified goods and/or services. 15 U.S.C. Section 1051(a), as amended.

In International Class 035, the mark was first used at least as early as 02/01/2009, and first used in commerce at least as early as 02/01/2009, and is now in use in such commerce. The applicant is submitting one specimen(s) showing the mark as used in commerce on or in connection with any item in the class of listed goods and/or services, consisting of a(n) Screenshot from Applicant's Internet website displaying the mark and advertising the services.

#### Original PDF file:

[spec-7220138196-222010627 . city seal specimen.pdf](#)

#### Converted PDF file(s) (7 pages)

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[Specimen File3](#)

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[Specimen File5](#)

[Specimen File6](#)

[Specimen File7](#)

International Class 039: municipal services, namely, providing city administration and public utilities services

Use in Commerce: The applicant is using the mark in commerce, or the applicant's related company or licensee is using the mark in commerce, or the applicant's predecessor in interest used the mark in commerce, on or in connection with the identified goods and/or services. 15 U.S.C. Section 1051(a), as amended.

In International Class 039, the mark was first used at least as early as 02/01/2009, and first used in commerce at least as early as 02/01/2009, and is now in use in such commerce. The applicant is submitting one specimen(s) showing the mark as used in commerce on or in connection with any item in the class of listed goods and/or services, consisting of a(n) Screenshot from Applicant's Internet website displaying the mark and advertising the services.

**Original PDF file:**

spec-7220138196-222010627 . city seal specimen.pdf

**Converted PDF file(s) (7 pages)**

Specimen File1

Specimen File2

Specimen File3

Specimen File4

Specimen File5

Specimen File6

Specimen File7

The applicant hereby appoints Mark G. Chretien and Ben D. Tobor, Anthony F. Matheny and Jason P. Sander of Greenberg Traurig LLP

Suite 1700

1000 Louisiana

Houston, Texas 77002

United States

to submit this application on behalf of the applicant. The attorney docket/reference number is 116673.010100.

Correspondence Information: Mark G. Chretien

Suite 1700

1000 Louisiana

Houston, Texas 77002

713-374-3528(phone)

713-754-7528(fax)

A fee payment in the amount of \$650 has been submitted with the application, representing payment for 2 class(es).

**Declaration**

The undersigned, being hereby warned that willful false statements and the like so made are punishable by fine or imprisonment, or both, under 18 U.S.C. Section 1001, and that such willful false statements, and the like, may jeopardize the validity of the application or any resulting registration, declares that he/she is properly authorized to execute this application on behalf of the applicant; he/she believes the applicant to be the owner of the trademark/service mark sought to be registered, or, if the application is being filed under 15 U.S.C. Section 1051(b), he/she believes applicant to be entitled to use such mark in commerce; to the best of his/her knowledge and belief no other person, firm, corporation, or association has the right to use the mark in commerce, either in the identical form thereof or in such near resemblance thereto as to be likely, when used on or in connection with the goods/services of such other person, to cause confusion, or to cause mistake, or to deceive; and that all statements made of his/her own knowledge are true; and that all statements made on information and belief are believed to be true.

Signature: /mgc/ Date Signed: 02/01/2009

Signatory's Name: Mark G. Chretien

Signatory's Position: Attorney of record, Texas bar member

RAM Sale Number: 6141

RAM Accounting Date: 02/02/2009

Serial Number: 77660948

Internet Transmission Date: Sun Feb 01 22:31:09 EST 2009

TEAS Stamp: USPTO/BAS-72.20.138.196-2009020122310927

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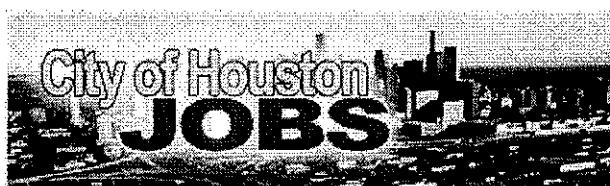


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**January 17, 24, and 31  
Neighbors Helping Neighbors Ike Cleanup**



The City of Houston's "Neighbors Helping Neighbors" program to assist elderly and physically challenged residents remove Hurricane Ike debris from their backyards to the curb has resumed. The "Neighbors Helping Neighbors" program is seeking volunteers from the community to assist with this effort on the next three consecutive Saturdays: January 17, 24 and 31, 2009.

With over 800 calls for service in this program, we have many homeowners, 60+ years old or physically challenged who can use your help. Many requests are being handled by professionals but



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(Guide updated Tuesday, January 27, 2009 at 3:00 p.m.)

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volunteers can complete the job by bagging, sweeping and moving the debris to the curb for pickup.

More ...

**January 21 to February 28**  
**Mayor's New Year, New You Challenge**



The Mayor's New Year New You Challenge is a five week wellness program which aims to encourage and motivate Houstonians of all ages and abilities to engage in wellness activities during the New Year. Specifically, the challenge will raise participants' awareness of their daily physical activities, encourage healthy eating and routine exercise in a fun and supportive environment. More ...

**February 11**  
**Housing and Employment Resources Expo (HERE) for People With Disabilities**



This unique event will provide an opportunity for people with disabilities to meet with prospective employers, as well as representatives from various housing related entities and other resource agencies. Participants will be able to participate in hands-on workshops pertaining to housing and employment issues and receive important information at booths hosted by community organizations, employers, and sponsors. More ...



**Get Moving Houston**

Mayor Bill White, Houston business heavyweights step up to the plate to launch new citywide wellness initiative. Houston Wellness Association seeks to make Houston

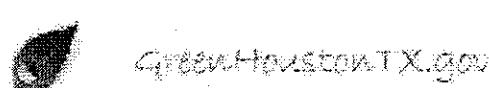


A roofing contractor and/or citizens can call 713.837.ROOF to get information on the program or view the online application.



**Gulf Coast Ike Relief Fund**  
**c/o The Greater Houston**  
**Community Foundation**  
**4550 Post Oak Place, Suite 100**  
**Houston, TX 77027**  
[www.ghcf.org](http://www.ghcf.org)

**Hurricane Ike Disaster Proclamations**



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"the model city for wellness".  
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**Houston Forecast**

**57°F**  
Fair



Humidity: 28%  
Wind: W at 8 mph  
Wind Chill: 55°F

Weather by City, ST or Zip:

City, ST/Zip

### Calendar of Events

Dec	January 2009					Feb
Mo	Tu	We	Th	Fr	Sa	Su
				1	2	
				3	4	5
				6	7	8
				9	10	11
				12	13	14
				15	16	17
				18	19	20
				21	22	23
				24	25	26
				27	28	29
				30	31	

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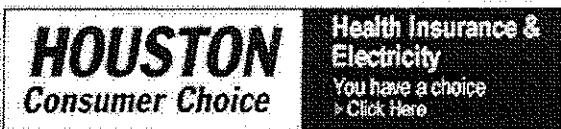
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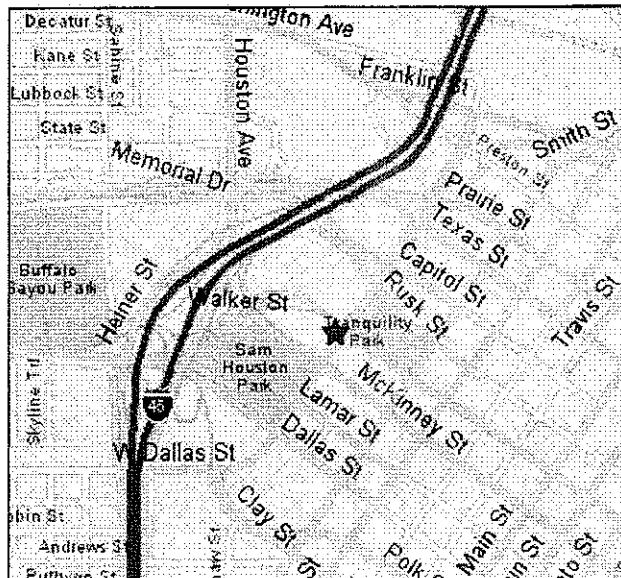
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Greater Houston Convention and Visitors Bureau  
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Houston, TX 77002  
1.800.4.HOUSTON



*LOCATION: Downtown, on the ground floor of City Hall, 901 Bagby.*

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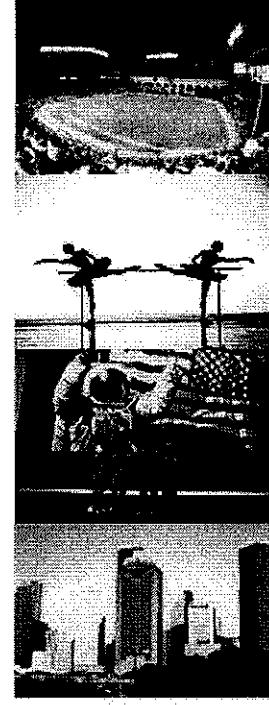
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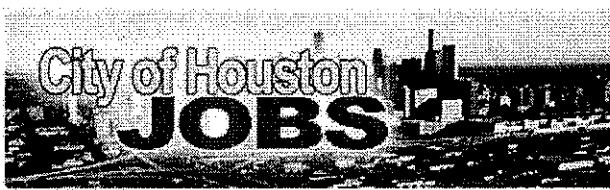
Saturday, January 31 - 2009



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**January 21 to February 28**  
**Mayor's New Year, New You Challenge**



The Mayor's New Year New You Challenge is a five week wellness program which aims to encourage and motivate Houstonians of all ages and abilities to engage in wellness activities during the New Year. Specifically, the challenge will raise participants' awareness of their daily physical activities, encourage healthy eating and routine exercise in a fun and supportive environment. More ...

**February 11**  
**Housing and Employment Resources Expo (HERE) for People With Disabilities**



This unique event will provide an opportunity for people with disabilities to meet with prospective employers, as well as representatives from various housing related entities and other resource agencies. Participants will be able to participate in hands-on workshops pertaining to housing and employment issues and receive important information at booths hosted by community organizations, employers, and sponsors. More ...



**Get Moving Houston**

Mayor Bill White, Houston business heavyweights step up to the plate to launch new citywide wellness initiative. Houston Wellness Association seeks to make Houston



A roofing contractor and/or citizens can call 713.837.ROOF to get information on the program or view the online application.



**Gulf Coast Ike Relief Fund**  
**c/o The Greater Houston Community Foundation**  
**4550 Post Oak Place, Suite 100**  
**Houston, TX 77027**  
[www.ghcf.org](http://www.ghcf.org)

**Hurricane Ike Disaster Proclamations**



[GreenHoustonTX.gov](http://GreenHoustonTX.gov)

**Don't Stand In Line**  
 Online Services is your one-stop shop for online city services and links that offer e-Gov services. Use the drop down to select the service you require.

Select Online Service Here ...





"the model city for wellness".  
More...



Houston  
Forecast

57°F  
Fair



Humidity: 28%  
Wind: W at 8 mph  
Wind Chill: 55°F

Weather by City, ST or Zip:

City, ST/Zip

### Calendar of Events

Dec		January 2009					Feb	
Mo	Tu	We	Th	Fr	Sa	Su	Mo	Tu
					1	2	3	
					4	5	6	7
					8	9	10	11
					12	13	14	15
					16	17	18	19
					19	20	21	22
					23	24	25	26
					27	28	29	30
					31			

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[Michael H. Sherrill](#)



**BANK ON  
HOUSTON**

[www.bankonhouston.org](http://www.bankonhouston.org)



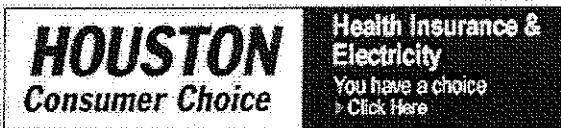
[www.houstonpowertopeople.com](http://www.houstonpowertopeople.com)

<http://www.houstontx.gov/>

1/31/2009

City of Houston eGovernment Center

Page 4 of 4



[www.HoustonConsumerChoice.com](http://www.HoustonConsumerChoice.com)

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HOME I WANT TO... GOVERNMENT RESIDENTS BUSINESS DEPARTMENTS VISITORS

Website  Entire Site ...  My ZIP Code

[www.houstontx.gov](http://www.houstontx.gov) > About Houston > Tourism

## About Houston

- > Airports
- > Annual Events
- > Arts & Museums
- > Business in Houston
- > Calendar of Events
- > City Government
- > Conventions
- > Economy & Trade
- > Education
- > Exploring Houston
- > Facts and Figures
- > Health
- > Photo Tour of Houston
- > Relocating to Houston
- > Sports & Recreation
- > Tourism

## TOURISM

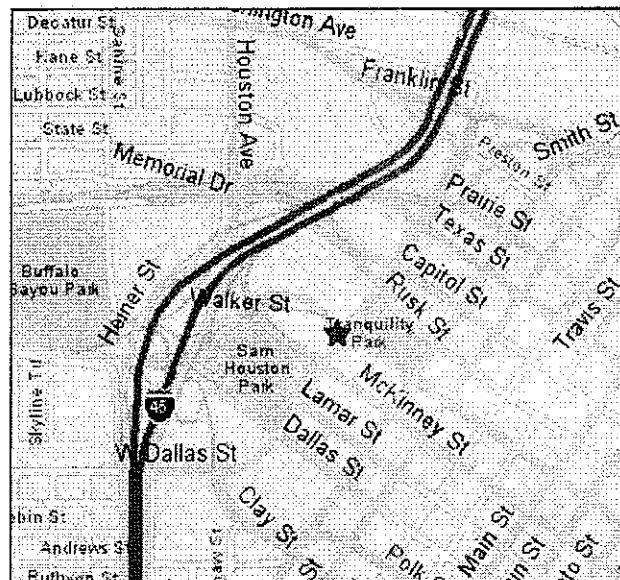
- Fun in the Bayou City is easy to find. Houston's downtown has been revitalized with numerous clubs, professional sports facilities and musical entertainment that has helped bring nightlife back to downtown. And that's in addition to the rest of the City's attractions, shopping and restaurants to fit all budgets.
- Don't know where to begin? Start at the City of Houston Visitors Center at City Hall for hundreds of ideas on enjoying your time in Houston. The staff can help you plan your visit, suggest new things to do with your evenings and weekends (even to City residents) or help you bring your convention or meeting to this exciting city.
- You can reach the GHCVB at 1-800-4-HOUSTON or online at [www.visithoustontexas.com](http://www.visithoustontexas.com).



# Houston

[www.visithoustontexas.com](http://www.visithoustontexas.com)

Greater Houston Convention and Visitors Bureau  
901 Bagby / First Floor  
Houston, TX 77002  
1.800.4.HOUSTON



**LOCATION:** Downtown, on the ground floor of City Hall, 901 Bagby.

Home | 311 City Helpline

En Español

[Contact Us](#)

FAQ

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Website

Entire Site ...

My ZIP Code 77002

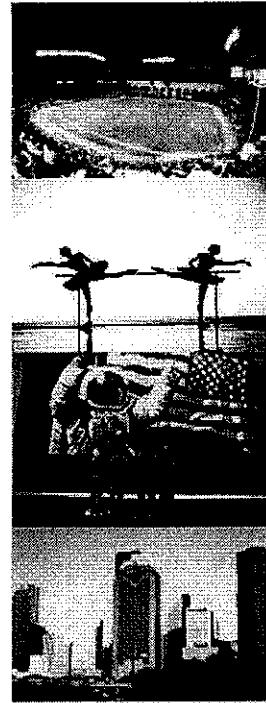
[www.houstontx.gov](http://www.houstontx.gov) > About Houston

## About Houston

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## ABOUT HOUSTON

- Alive with energy and rich in diversity, Houston is a dynamic mix of imagination, talent and first-class attractions that makes it a world-class city. Home to a vibrant economy, beautiful surroundings and a population full of optimism and spirit, it's no wonder that Houston is a popular international destination.
- In this section we provide you with options that will give you a good idea of what Houston is all about. You can also view our Calendar of Events to see more than 400 events in the Houston area throughout the next 12 months.
- You can enjoy Houston's outstanding performing and visual arts' venues. Try one of the countless restaurants available, offering cuisine in everything from Tex Mex and South American to Middle Eastern and Vietnamese. For sports fans we have local teams representing all major sports. Do some shopping; Houston offers something to fit every budget - from the exclusive shops in Houston's Uptown area to the outlet malls just outside the City.
- And that's just the beginning.



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IN THE APPLICATION

Please include the following disclaimer:

"No claim is made to the exclusive right to use "CITY OF HOUSTON TEXAS" apart from the mark as shown."

Please amend the description of the mark to read as follows:

"The mark consists of a circular seal having a rope pattern contour with a design of a plow, a locomotive and a five pointed Texas star, and the wording CITY OF HOUSTON TEXAS within the seal and a fleur de lis on each side of the term TEXAS."

Please amend the descriptions of services to read as follows:

"Class 035: municipal services, namely, promoting trade, commerce, economic development and tourism; city administrative services, namely, business administration and management of municipality services.

Class 039: municipal services, namely, providing public utilities services."

RESPONSE

Applicant is amending the application as indicated herein.

Applicant appreciates the Examining Attorney's indication that there are no similar registered or pending marks that would bar registration for Applicant's mark.

The Examining Attorney alleges that the previously submitted specimen is not acceptable because it does not show the applied-for mark used in connection with the services of Class 39, namely, providing public utilities services.

Applicant respectfully disagrees with this allegation. A copy of the previously submitted specimen, which comprises screenshots from the City of Houston's official Internet website, is

**UNITED STATES PATENT AND TRADEMARK OFFICE**

**SERIAL NO:** 77/660948

**MARK: CITY OF HOUSTON TEXAS**

**\*77660948\***

**CORRESPONDENT ADDRESS:**

MARK G. CHRETIEN  
GREENBERG TRAURIG LLP  
1000 LOUISIANA ST STE 1700  
HOUSTON, TX 77002-5005

**RESPOND TO THIS ACTION:**

<http://www.uspto.gov/teas/eTEASpageD.htm>

**GENERAL TRADEMARK INFORMATION:**

<http://www.uspto.gov/main/trademarks.htm>

**APPLICANT:** City of Houston

**CORRESPONDENT'S REFERENCE/DOCKET  
NO:**

116673.01040

**CORRESPONDENT E-MAIL ADDRESS:**

**OFFICE ACTION**

TO AVOID ABANDONMENT, THE OFFICE MUST RECEIVE A PROPER RESPONSE TO THIS OFFICE ACTION WITHIN 6 MONTHS OF THE ISSUE/MAILING DATE.

**ISSUE/MAILING DATE:**

Upon further review, the Office has determined the following:

**Refusal – Governmental Insignia**

Registration is refused because the applied-for mark is a governmental insignia for the City of Houston. Trademark Act Section 2(b), 15 U.S.C. §1052(b); *see* TMEP §1204. Trademark Act Section 2(b) bars registration of marks that include the flag, coat of arms, or other insignia of the United States, any state or municipality, or any foreign nation. TMEP §1204.

**1204.02(a) Designs that are Insignia Under §2(b) Must Be Refused**

Flags and coats of arms are specific designs formally adopted to serve as emblems of governmental authority. The wording "other insignia" should not be interpreted broadly, but should be considered to include only those emblems and devices that also represent governmental authority and that are of the same general class and character as flags and coats of arms.

The following are insignia of the United States for purposes of §2(b):

- Great Seal of the United States
- Presidential Seal
- **Seals of Government Agencies**

The Trademark Trial and Appeal Board has construed the statutory language as follows:

[T]he wording "or other insignia of the United States" must be restricted in its application to insignia of the same general class as "the flag or coats of arms" of the United States. Since both the flag and coat of arms are emblems of national authority it seems evident that other insignia of national authority such as the Great Seal of the United States, the Presidential Seal, and seals of government departments would be equally prohibited registration under Section 2(b). On the other hand, it appears equally evident that department insignia which are merely used to identify a service or facility of the Government are not insignia of national authority and that they therefore do not fall within the general prohibitions of this section of the Statute.

*In re U.S. Department of the Interior*, 142 USPQ 506, 507 (TTAB 1964) (logo comprising the words "NATIONAL PARK SERVICE" and "Department of the Interior," with depiction of trees, mountains, and a buffalo, surrounded by an arrowhead design, held not to be an insignia of the United States). The Trademark Trial and Appeal Board recently reaffirmed this interpretation in *In re Peter S. Herrick, P.A.*, 91 USPQ2d 1505 (TTAB June 26, 2009), by affirming the §2(b) refusal since applicant's seal design was virtually identical to the seal used by the United States Department of the Treasury.

The specimens submitted by the applicant show the proposed mark is used as the governmental insignia throughout the City of Houston's official website. Please see attached web pages from the City of Houston's official website. The fact that the applicant is the City of Houston does not overcome the refusal.

Trademark Act Section 2(b) is an absolute bar to registration on the Principal and Supplemental Registers. Trademark Act Sections 2(b) and 23(a), (c), 15 U.S.C. §§1052(b), 1091(a), (c); *see* TMEP §§1204, 1204.04(a).

Although the trademark examining attorney has refused registration, applicant may respond to the refusal to register by submitting evidence and arguments in support of registration.

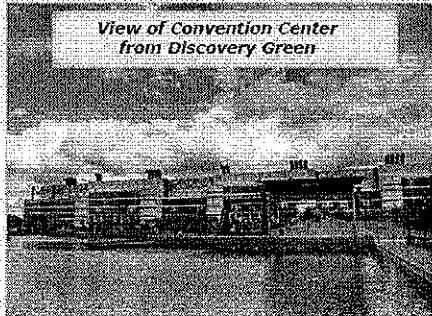
/Sally Shih/  
Sally Shih  
Trademark Examining Attorney  
Law Office 106  
USPTO

 **City of Houston**  [En Español](#)  
The Official Site for Houston, Texas

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Search   Entire Site...  My ZIP Code: 77002

Thursday, December 17, 2009

**View of Convention Center from Discovery Green**  


Welcome to the City of Houston eGovernment Center. Here you can apply for a job, pay traffic tickets and pay water bills, find out about Houston events and the Mayor's Office of Special Events, and learn about the City government that serves you. See our Houston WiFi site, view our homepage photo archive and send us your favorite photo of Houston!

**City Headlines**

- [Mayor White Supports the Findings of the General Accounting Office Review of Army Tactical Vehicle Production Contract](#)
- [Elected Officials Photo Gallery: 2010 - 2012](#)
- [Reliant Energy, and the City of Houston, Launch Electric Vehicle Pilot Project](#)
- [Christmas and New Year Holiday Week Trash Pickup Schedules](#)
- [Hurricane Ike Mediation Program Info](#)

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- [Code Enforcement Permits](#)
- [Commercial Permits](#)
- [Street Cut Permits](#)
- [Traffic Permits](#)

**census 2010 houston counts**  
[www.houstontx.gov/census2010](http://www.houstontx.gov/census2010)

**City of Houston WiFi**



convey a different message about what ordinary citizens can do to combat global warming. The five-foot diameter, seven-foot-tall globes will be decorated by local, national and international artists. More...

#### December 31 Texas Bowl



Featuring Missouri vs. Navy, The 2009 Texas Bowl will be played on Thursday, December 31 at 2:30 p.m. CST at Reliant Stadium. The game will be televised nationally on ESPN. Tickets are available at all TicketMaster outlets, online at TicketMaster.com and by phone at 832-367-2390. More...

#### January 17 Chevron Houston Marathon



Be a part of Houston's largest single-day sporting event. Combined with the Aramco Houston Half Marathon, the Houston Press / Smart Financial Credit Union 5K and the Texas Children's Hospital Kids Fun Run, more than 20,000 participants, 200,000 spectators and 5,000 volunteers will take to the streets. Begins and ends at George R. Brown Convention Center. More...

#### The Purchasing Catalog:



Get Moving Houston.



Register for CitizensNet



**CitizensNet**

Would you like to receive periodic e-mails on important City issues of interest to you and your neighborhood? If so, please click the graphic above and register with CitizensNet today. Register Now!

View the CitizensNet Archive



**Special Events Permits**

- Parade & Silver Functions
- General Event Permits



#### Online Services

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Select Online Service Here ...



**Green Houston**

Green Houston is a City of Houston program.

<http://www.houstontx.gov/>

12/17/2009 11:34:02 AM

**Get Moving Houston**

Mayor Bill White, Houston business heavyweights step up to the plate to launch new citywide wellness initiative: Houston Wellness Association seeks to make Houston "the model city for wellness".  
More...

[www.houstonpowertopeople.com](http://www.houstonpowertopeople.com)

Health Insurance &  
Electricity  
You have a choice  
Click here

[www.HoustonConsumerChoice.com](http://www.HoustonConsumerChoice.com)

Residential Energy Efficiency Program

[www.reephouston.net](http://www.reephouston.net)

BANK ON  
HOUSTON

[www.bankonhouston.org](http://www.bankonhouston.org)

Online Asset Auction

[www.houstoncitysurplus.org](http://www.houstoncitysurplus.org)

**Houston Oral History Project**  
Experience the fascinating history of Houston through the stories of its residents in sound and on video.



**Adopt a Pet Today**  
from BARC

Bureau of Animal Regulation and Care



Houston Forecast / Traffic



**Houston Forecast**  
63°F  
Rain

Humidity: 97%  
Wind: N at 6 mph

Weather by City, ST or Zip:  
[City, ST/Zip]

[www.houstoncitysurplus.org](http://www.houstoncitysurplus.org)

**Calendar of Events**

S	S	M	T	W	T	F	S
1	2	3	4	5	6	7	8
9	10	11	12	13	14	15	16
17	18	19	20	21	22	23	24
25	26	27	28	29	30	31	1
2	3	4	5	6	7	8	9

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**Inside The City of Houston**

**Mayor Bill White**



- [Welcome to the City of Houston eGovernment Center](#)
- [Bienvenidos al Centro Electrónico del Gobierno de la Ciudad de Houston ...](#)
- [Houston City History: Mayor Louis Welch](#)
- [Houston Mayors Photo Galerry](#)

**Bravo Awards**



**City Employee SpotLight**

**Art Zehnder**  
Convention and Entertainment Facilities Department

**Art Zehnder** is the highly regarded director of sales for the convention center, but it was in the midst of Hurricane Ike that his star shined brightest. Going non-stop for 10 days, he inspired co-workers and volunteers to provide top-notch service and comfort to those who lost everything they had. For those people, the cavernous George R. Brown Convention Center was home as a Red Cross Staging Area. [More ...](#)

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 **City of Houston**  The Official Site for Houston, Texas

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**GOVERNMENT LINKS**

If you would like to add or update content on the page, please contact [webmaster@cityofhouston.net](mailto:webmaster@cityofhouston.net).

Area Cities, Towns and Villages			
Alvin	Dayton	Bellaire	Bunker Hill Village
Conroe	Dayton	Cook Park	Dickinson
Friendswood	Galveston	Hedwig Village	Humble
Hunters Creek Village	Jersey Village	Katy	Kemah
La Porte	Lake Jackson	League City	Manvel
Missouri City	Pasadena	Pearland	Piney Point
Rosenberg	Santa Fe	Seabrook	Southside Place
Spring Valley	Stafford	Sugar Land	Texas City
Tiki Island	Tomball	Waller	Webster
West University Place			

Area Counties			
Brazoria	Chambers	Fort Bend	Galveston
Harris	Liberty	Montgomery	San Jacinto

**Other State and National Government Links**

State of Texas	Texas House	Texas Senate	U.S. House
U.S. Senate	White House		

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- [mayor@cityofhouston.net](mailto:mayor@cityofhouston.net)
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- [Public Information Requests](#)
- [Section 508 Compliance](#)
- [SPAN Policy](#)
- [webmaster@cityofhouston.net](mailto:webmaster@cityofhouston.net)

**DEPARTMENTS AND DIRECTORS**

 <p>Gloria Bingham 3-1-1 713.837.9534 Administration and Regulatory Affairs</p>	 <p>Alfred Moran 713.837.9534 Administration and Regulatory Affairs</p>	 <p>Velma Laws 713.837.9000 Affirmative Action and Contract Compliance</p>
 <p>Eric Potts 281.233.3000 Aviation</p>	 <p>Claudia Vasquez 832.393.0955 Citizens Assistance Office</p>	 <p>Anna Russell 832.393.1100 City Secretary</p>

[Webmaster City Hall Home Page](#)[Website Survey](#)[Welcome to Our Web Site](#)

Devin Ulrich  
713.553.8000  
Convention and  
Entertainment



Michelle Mitchell  
713.221.0935  
Finance



Phil Brinkley  
713.247.5000  
Fire



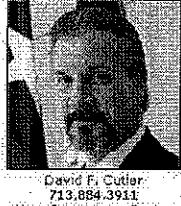
Isaac Z. Dardush, P.E.  
832.393.8000  
General Services



Stephen L. Williams  
713.794.9320  
Health and Human Services



Richard Celli  
713.568.6300  
Housing



David F. Cutler  
713.884.3911  
Hou. Emergency Center



Candy Aldridge  
Acting Director  
713.887.9300  
Human Resources



Richard Lewis  
832.393.0082  
Information Technology



Arturo Michel  
832.393.6491  
Legal



Phoe Brown  
Lawson, Ph.D.  
832.393.1300  
Library



Shiree J. Abdool  
713.247.5660  
Municipal Courts  
Administration



Bersa Mella  
713.247.5464  
Municipal Courts/Judicial



Joe Turner  
713.865.4590  
Parks and Recreation



Merlene Gerrick  
713.837.7701  
Planning and Development



Harold L. Hutto  
713.806.1600  
Police



Michael S. Marocca  
713.837.0090  
Public Works and  
Engineering



Harry Hayes  
713.837.0103  
Solid Waste Management

\*A Division of the Mayor's Office

City of Houston

City Hall

1200 Travis Street • Houston, TX 77002 • 713.227.5000

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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
TRADEMARK EXAMINING DIVISION**

Mark:	CITY OF HOUSTON TEXAS	)	
		)	
Classes:	035; 039	)	Trademark Examining Attorney: Sally Shih
		)	
Applicant:	City of Houston	)	Law Office: 106
		)	
Serial No.:	77/660,948	)	
		)	
Filed:	February 1, 2009	)	Attorney Docket No.: 116673.010400
		)	

**RESPONSE TO OFFICE ACTION**

Commissioner for Trademarks  
P. O. Box 1451  
Alexandria, Virginia 22313-1451

**CERTIFICATE OF MAILING**  
37 C.F.R. § 1.8

I hereby certify that this correspondence is being deposited with the U.S. Postal Service, First Class Postage prepaid, the envelope addressed to: Commissioner for Trademarks, P. O. Box 1451, Alexandria, Virginia 22313-1451, on the date below.

6-16-2010  
Date

*Linda Guice*  
Linda Guice

Dear Madame:

In response to the Office Action dated December 17, 2009, the City Of Houston (hereafter "Applicant," "City of Houston" or "City") files the following Response. Reconsideration of this application is respectfully requested.

**REFUSAL TO REGISTER**

Registration has been refused for Applicant's mark because Trademark Act Section 2(b) bars registration of marks that include the flag, coat of arms, or other insignia of the United States, any state or municipality, or any foreign nation.

06-18-2010

HOU 406,976,995v2

U.S. Patent & TmOfc/TM Mail Rpt. Ds. \$0

[T]he wording "or other insignia of the United States" must be restricted in its application to insignia of the same general class as "the flag or coats of arms" of the United States. Since both the flag and coat of arms are emblems of national authority it seems evident that other insignia of national authority such as the Great Seal of the United States, the Presidential Seal, and seals of government departments would be equally prohibited registration under Section 2(b). On the other hand, it appears equally evident that department insignia which are merely used to identify a service or facility of the Government are not insignia of national authority and that they therefore do not fall within the general prohibitions of this section of the Statute.

*In re U.S. Department of the Interior*, 142 USPQ 506, 507 (TTAB 1964).

According to TMEP 1204.02(a), the statute "does not list any exceptions that would allow for countries, states, or municipalities to register their own flags or insignia, and applications for marks that contain flags, coats of arms, or government insignia, even if filed by the relevant state, country, or municipality, must be refused." (italics and underlining added).

The TMEP does not cite any case law to support the construction of the statute contained in TMEP 1204.02(a).

#### RESPONSE

Applicant respectfully submits that Trademark Act Section 2(b) should not prevent the City of Houston from registering its City Seal mark. The statutory language should be construed to allow a state, country, or municipality to register its own insignia, including a city's official

seal, to identify services that the state, country, or municipality provides to its citizens under the insignia.

1. Statutory Interpretation.

Section 2(b) is silent as to whether or not countries, states, or municipalities may register their own insignia. Applicant respectfully submits that one should look to the history surrounding the statute's enactment to determine how the statute should be interpreted.

The original statute was enacted in 1905. *See* 33 Stat. 725 (1905)(Exhibit B). Section 5 of the original statute deals with registration of "insignia." *Id.* The relevant wording in Section 5 of the original statute is virtually identical to the wording of present day Section 2(b).

Original Statute (1905)	Present Day Statute (2010)
<p>"That no mark by which the goods of the owner of the mark may be distinguished from other goods of the same class shall be refused registration as a trade-mark on account of the nature of such mark unless such mark --- Consists of or comprises the flag or coat of arms or other insignia of the United States, or any simulation thereof, or of any State or municipality, or of any foreign nation ... "</p>	<p>"No trademark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration on the principal register on account of its nature unless it --- Consists of or comprises the flag or coat of arms or other insignia of the United States, or of any State or municipality, or of any foreign nation, or any simulation thereof..."</p>

Section 5 was the earliest flag protection law, and was enacted to prevent desecration of the flag, coat of arms or related symbols by halting the registration of commercial trademarks

that contained representations of those marks. *See Flags and Seals of Texas*, 33 S. Tex. L. Rev. 215, 238 n. 73.5 (1992) (Exhibit C).

One source describes the thinking of the time as follows:

"The use of flags in commercial advertising accelerated as the cult of the flag grew. Those with products to sell recognized the increased attention and reverence the flag received and moved to capitalize on its power. Flag business cards became fashionable; printed advertisements displayed flags with a wide variety of nonrelated products; and flag-printed paraphernalia, expanding on the ideas for souvenirs that marked the celebration of the centennial, demonstrated that entrepreneurs and businessmen believed patriotic responses to the flag would encourage consumers to buy their products....

There was no legal restraint to control with which products the flag should be associated, so although it appeared in national advertisements for products such as cod liver oil and sarsaparilla, the image was also used commercially to sell whiskey, lager beer and tobacco....

[A] hereditary society committee, disturbed by what they saw as desecration of a sacred symbol for private economic gain, complied a list of offensive products on sale in 1896 that fit this category; the aforementioned partisan banners and posters, patriotic envelops, awnings, neckties, hosiery, towels, napkins, handkerchiefs, minstrel coats, ballet skirts, boxing trunks, clown costumes,

professional bicyclist apparel, picture mats, hammocks, pillows, cushions for yachts and chairs, quilts, equine fly nets and dog blankets.

*See Scot M. Guenter, The American Flag, 1777-1924 Cultural Shifts from Creation to Codification at 137-39 (1990)(Exhibit D).*

Much of the sentiment behind the enactment of the earliest form of this statute was to prevent private interests from using the flag and other government insignia for personal commercial gain. The original statute was not intended to prevent the relevant states, countries, or municipalities from protecting their own insignia. Instead, the purpose was the exact opposite, to protect the states, countries, or municipalities from having their insignia misappropriated or used for improper commercial purposes by private individuals or entities.

These same interests are relevant to the City of Houston over 100 years after the enactment of the statute. The City provides a wide range of municipal services to its citizens. The City uses its Seal to identify itself as the source of these municipal services. The registration of the City's Seal would allow the City to prevent the unauthorized use of its Seal by third-parties. The unauthorized use of the City's Seal by a third-party would cause confusion and/or mislead consumers as to the origin, sponsorship, or approval by the City of other parties' goods, services, or commercial activities.

For example, imagine if a private party was to advertise and provide sewage and water services using the City Seal, without the permission of the City. Some citizens might believe that this other party is somehow sponsored or authorized by the City to provide these services. This could very well result in consumer confusion, and the results could be disasterous. To

prevent this from occurring, the City should be able to "vouch for" the quality of essential public utility services provided under its City Seal.

Unfortunately, the current interpretation of Section 2(b) of the statute hinders the City's ability to provide this vital consumer protection to its citizens. The City cannot obtain a federal registration for its official seal and cannot take advantage of all the protections that such a registration can provide, such as a *prima facie* indication that the City is the exclusive source of the municipal services for which the mark is registered. In this regard, the present statutory interpretation prevents the interests of justice from being served and should be reconsidered as a matter of public policy.

2. The Insignia is Being Registered For Use In Connection with Municipal Services Provided by the Applicant City.

The case law indicates that the language in Section 2(b) is to be construed narrowly and should be "restricted in its application" to only those insignia that are being used as "emblems of national authority." *In re U.S. Department of the Interior*, 142 USPQ at 506. In contrast, insignia which are "merely used to identify a service or facility of the Government" do not fall within the general prohibitions of the statute. *Id.*

The City of Houston is not seeking to register its City Seal as an "emblem of authority." Instead, it is seeking to register the City Seal in connection with specific municipal services that it provides to its citizens via its various City departments. Examples of these services include providing public utility services such as water and sewage, and promotion of trade, commerce, economic development and tourism. These permitted uses do not fall within the narrow prohibitions of the statute set forth in the case law.

3. Third Party Registrations for City Seals.

Applicant has searched the USPTO database and found the following representative examples of federal registrations that other cities have obtained for their official city seals:

CITY OF FREDERICK FOUNDED 1745, U.S. Reg. No. 2,642,489

CHESTER PENNSYLVANIA SETTLED IN 1644, U.S. Reg. No. 2,630,723

CITY OF SCOTTSDALE ARIZONA THE WEST'S MOST WESTERN TOWN, U.S.  
Reg. No. 3,263,901

CITY OF MIAMISBURG OHIO'S STAR CITY, U.S. Reg. No. 2,522,124

CITY OF ALISO VIEJO CALIFORNIA JULY 2001, U.S. Reg. No. 3,343,032

PRIDE IN THE PAST - THE ORIGINAL WASHINGTON - FAITH IN THE FUTURE  
1776 WASHINGTON NORTH CAROLINA, U.S. Reg. No. 3,571,997

CITY OF FULLERTON CALIFORNIA, U.S. Reg. No. 2,877,383

CITY OF CORAL GABLES FLORIDA, U.S. Reg. No. 3,048,803

CITY OF GREENSBORO, NORTH CAROLINA 1808, U.S. Reg. No. 3,217,400

CITY OF PERRYSBURG 1816, U.S. Reg. No. 2,868,733

SEAL OF THE CITY OF OKLAHOMA CITY, U.S. Reg. No. 3,625,134

CITY · OF · VIRGINIA · BEACH · VIRGINIA LANDMARKS OF OUR NATION'S  
BEGINNING, U.S. Reg. No. 3,697,564

CITY OF ROSSFORD, OHIO ... U.S.A. ... 1898 1971, U.S. Reg. No. 3,739,212

Applicant respectfully notes that at least one of these registrations, U.S. Reg. No. 3,739,212 for CITY OF ROSSFORD, OHIO ... U.S.A. ... 1898 1971, was granted on January 19,

2010, which is subsequent to the date of Applicant's Office Action with a refusal to register. Applicant requests clarification as to how these other city seals were deemed registrable in view of the statute cited against Applicant.

In view of this Response, Applicant respectfully requests that the refusal to register be withdrawn and a Certificate of Registration be issued.

Respectfully submitted,

Date: June 16, 2010

Mark G. Chretien

Mark G. Chretien  
Ben D. Tobor  
GREENBERG TRAURIG LLP  
1000 Louisiana Street, Suite 1700  
Houston, Texas 77002  
Phone: (713) 374-3568  
Fax: (713) 754-7568  
Attorneys for Applicant,  
City of Houston

**UNITED STATES PATENT AND TRADEMARK OFFICE (USPTO)  
OFFICE ACTION (OFFICIAL LETTER) ABOUT APPLICANT'S TRADEMARK APPLICATION**

**APPLICATION SERIAL NO.** 77/660948

**MARK: CITY OF HOUSTON TEXAS**

**\*77660948\***

**CORRESPONDENT ADDRESS:**

MARK G. CHRETIEN  
GREENBERG TRAURIG LLP  
1000 LOUISIANA ST STE 1700  
HOUSTON, TX 77002

**CLICK HERE TO RESPOND TO THIS LETTER:**  
<http://www.uspto.gov/teas/eTEASpageD.htm>

**APPLICANT:** City of Houston

**CORRESPONDENT'S REFERENCE/DOCKET  
NO:**

116673.01040

**CORRESPONDENT E-MAIL ADDRESS:**

**OFFICE ACTION**

**STRICT DEADLINE TO RESPOND TO THIS LETTER**

TO AVOID ABANDONMENT OF APPLICANT'S TRADEMARK APPLICATION, THE USPTO MUST RECEIVE APPLICANT'S COMPLETE RESPONSE TO THIS LETTER WITHIN 6 MONTHS OF THE ISSUE/MAILING DATE BELOW.

**ISSUE/MAILING DATE:**

**THIS IS A FINAL ACTION.**

This Office action is in response to applicant's communication filed on 6/16/2010. The applicant has argued against the Section 2(b) governmental insignia refusal. However, the argument has been rejected.

The following refusal is now made FINAL: Section 2(b) governmental insignia refusal. *See* 37 C.F.R. §2.64(a).

**Final Refusal – Governmental Insignia**

Registration is refused because the applied-for mark includes a governmental insignia of the City of Houston. Trademark Act Section 2(b), 15 U.S.C. §1052(b); *see* TMEP §1204. Trademark Act Section 2(b) bars registration of marks that include the flag, coat of arms, or other insignia of the United States, any state or municipality, or any foreign nation. TMEP §1204.

The previously provided evidence from the official website of the City of Houston shows that the applied-for mark is the official governmental insignia for the City of Houston.

The applicant argued the history and “statutory interpretation” should not prevent registration of insignia of municipality. However, on the face of the statute, Section 2(b) bars registration of insignia of any state or municipality. Section 1204.02 specifically indicated “Seals of Government Agencies” as examples of insignia of the United States for purposes of Section 2(b). Please see TMEP sections below or [http://atlas.uspto.gov:90/tmdb/tmep/1200.htm#\\_T120402](http://atlas.uspto.gov:90/tmdb/tmep/1200.htm#_T120402).

## 1204.02 Government Insignia

### 1204.02(a) Designs that are Insignia Under §2(b) Must Be Refused

Flags and coats of arms are specific designs formally adopted to serve as emblems of governmental authority. The wording “other insignia” should not be interpreted broadly, but should be considered to include only those emblems and devices that also represent governmental authority and that are of the same general class and character as flags and coats of arms.

The following are insignia of the United States for purposes of §2(b):

- Great Seal of the United States
- Presidential Seal
- Seals of Government Agencies

The Trademark Trial and Appeal Board has construed the statutory language as follows:

[T]he wording “or other insignia of the United States” must be restricted in its application to insignia of the same general class as “the flag or coats of arms” of the United States. Since both the flag and coat of arms are emblems of national authority it seems evident that other insignia of national authority such as the Great Seal of the United States, the Presidential Seal, and seals of government departments would be equally prohibited registration under Section 2(b). On the other hand, it appears equally evident that department insignia which are merely used to identify a service or facility of the Government are not insignia of national authority and that they therefore do not fall within the general prohibitions of this section of the Statute.

*In re U.S. Department of the Interior*, 142 USPQ 506, 507 (TTAB 1964) (logo comprising the words “NATIONAL PARK SERVICE” and “Department of the Interior,” with depiction of trees, mountains, and a buffalo, surrounded by an arrowhead design, held not to be an insignia of the United States). The Trademark Trial and Appeal Board recently reaffirmed this interpretation in *In re Peter S. Herrick, P.A.*, 91 USPQ2d 1505 (TTAB June 26, 2009), by affirming the §2(b) refusal since applicant’s seal design was virtually identical to the seal used by the United States Department of the Treasury.

## **1204.02(b) Examples of Insignia That Should Be Refused**

*Examples:* The following are examples of insignia that should be refused under §2(b):

*Great Seal of the United States*

*Seal of The President of The United States*

*The Official Seal of a Government Agency*

The applicant does not dispute that the proposed mark is an insignia for the City of Houston. The applicant argued instead is that an exception should be made because the City of Houston is the applicant. However, Section 2(b) does not provide for any exceptions. The fact that the applicant is the City of Houston does not overcome the refusal.

Trademark Act Section 2(b) is an absolute bar to registration on the Principal and Supplemental Registers.

Trademark Act Sections 2(b) and 23(a), (c), 15 U.S.C. §§1052(b), 1091(a), (c); *see* TMEP §§1204, 1204.04(a).

A refusal under Trademark Act Section 2(b) differs from a refusal of a national symbol under Section 2(a) because Section 2(b) requires evidence only that the mark includes the flag, coat of arms or other insignia of the United States, any state or municipality or any foreign nation. TMEP §1204. A Section 2(a) refusal of a national symbol, on the other hand, requires not only evidence that the matter in the mark is a national symbol, but also evidence that the mark is disparaging of or falsely suggests a connection with the country to which the symbol refers. *See* TMEP §§1203.03, 1203.03(b), 1204.

Accordingly, the refusal made under Section 2(b) is maintained and made FINAL.

### **Proper Response to Final Action**

If applicant does not respond within six months of the mailing date of this final Office action, the application will be abandoned. 15 U.S.C. §1062(b); 37 C.F.R. §2.65(a). Applicant may respond to this final Office action by:

- (1) Submitting a response that fully satisfies all outstanding requirements, if feasible; and/or
- (2) Filing an appeal to the Trademark Trial and Appeal Board, with an appeal fee of \$100 per class.

37 C.F.R. §§2.6(a)(18), 2.64(a); TBMP ch. 1200; TMEP §714.04.

In certain rare circumstances, a petition to the Director may be filed pursuant to 37 C.F.R. §2.63(b)(2) to review a final Office action that is limited to procedural issues. 37 C.F.R. §2.64(a); TMEP §714.04; *see*

37 C.F.R. §2.146(b); TBMP §1201.05; TMEP §1704 (explaining petitionable matters). The petition fee is \$100. 37 C.F.R. §2.6(a)(15).

/Sally Shih/  
Sally Shih  
Trademark Examining Attorney  
Law Office 106  
USPTO  
(tel) 571-272-9712  
(fax) 571-273-9106

**TO RESPOND TO THIS LETTER:** Use the Trademark Electronic Application System (TEAS) response form at <http://teasroa.uspto.gov/roa/>. Please wait 48-72 hours from the issue/mailing date before using TEAS, to allow for necessary system updates of the application. For *technical* assistance with online forms, e-mail [TEAS@uspto.gov](mailto:TEAS@uspto.gov).

**WHO MUST SIGN THE RESPONSE:** It must be personally signed by an individual applicant or someone with legal authority to bind an applicant (i.e., a corporate officer, a general partner, all joint applicants). If an applicant is represented by an attorney, the attorney must sign the response.

**PERIODICALLY CHECK THE STATUS OF THE APPLICATION:** To ensure that applicant does not miss crucial deadlines or official notices, check the status of the application every three to four months using Trademark Applications and Registrations Retrieval (TARR) at <http://tarr.uspto.gov/>. Please keep a copy of the complete TARR screen. If TARR shows no change for more than six months, call 1-800-786-9199. For more information on checking status, see <http://www.uspto.gov/trademarks/process/status/>.

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**TO UPDATE CORRESPONDENCE/E-MAIL ADDRESS:** Use the TEAS form at <http://www.uspto.gov/teas/eTEASpageE.htm>.

Trademark Trial and Appeal Board Electronic Filing System. <http://estta.uspto.gov>ESTTA Tracking number: **ESTTA388524**Filing date: **01/14/2011**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Application Serial No.	77660948
Applicant	City of Houston

**Notice of Appeal**

Notice is hereby given that City of Houston appeals to the Trademark Trial and Appeal Board the refusal to register the mark depicted in Application Serial No. 77660948.

The refusal to register has been appealed as to the following classes of goods/services:

- Class 035. First Use: 2009/02/01 First Use In Commerce: 2009/02/01  
All goods and services in the class are appealed, namely: municipal services, namely, promoting trade, commerce, economic development and tourism; city administrative services, namely, business administration and management of municipality services
- Class 039. First Use: 2009/02/01 First Use In Commerce: 2009/02/01  
All goods and services in the class are appealed, namely: municipal services, namely, providing public utilities services

Respectfully submitted,

/mgc/

01/14/2011

**MARK G. CHRETIEN**

**GREENBERG TRAURIG LLP**

**1000 LOUISIANA ST STE 1700**

**HOUSTON, TX 77002**

**UNITED STATES**

**chretienm@gtlaw.com, laipmail@gtlaw.com**

**713-374-3528**

to allow a state, country, or municipality to register its own insignia, including a city's official seal, to identify services that the state, country, or municipality provides to its citizens under the insignia.

1. Statutory Interpretation

Trademark Act Section 2(b) is silent as to whether or not countries, states, or municipalities may register their own insignia. Applicant respectfully submits that one should look to the history surrounding the statute's enactment to determine how the "silent" statute should be properly interpreted in this context.

The original statute was enacted in 1905. *See* 33 Stat. 725 (1905)(Exhibit B). Section 5 of the original statute deals with registration of "insignia." *Id.* The relevant wording in Section 5 of the original statute is virtually identical to the wording of present day Section 2(b).

Original Statute - Section 5 (1905)	Present Day Statute - Section 2(b) (2010)
<p>"That no mark by which the goods of the owner of the mark may be distinguished from other goods of the same class shall be refused registration as a trade-mark on account of the nature of such mark unless such mark --- Consists of or comprises the flag or coat of arms or other insignia of the United States, or any simulation thereof, or of any State or municipality, or of any foreign nation ... "</p>	<p>"No trademark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration on the principal register on account of its nature unless it --- Consists of or comprises the flag or coat of arms or other insignia of the United States, or of any State or municipality, or of any foreign nation, or any simulation thereof..."</p>

**UNITED STATES PATENT AND TRADEMARK OFFICE (USPTO)**

**APPLICATION SERIAL NO.** 77660948

**MARK: CITY OF HOUSTON TEXAS**



**CORRESPONDENT ADDRESS:**

MARK G CHRETIEN  
GREENBERG TRAURIG LLP  
1000 LOUISIANA ST SUITE 1700  
HOUSTON, TX 77002

**GENERAL TRADEMARK INFORMATION:**  
<http://www.uspto.gov/main/trademarks.htm>

**TTAB INFORMATION:**  
<http://www.uspto.gov/web/offices/dcom/ttab/index.html>

**APPLICANT:** City of Houston

**CORRESPONDENT'S REFERENCE/DOCKET NO.:**

116673.01040

**CORRESPONDENT E-MAIL ADDRESS:**

**EXAMINING ATTORNEY'S APPEAL BRIEF**

**I. STATEMENT OF THE CASE**

The applicant, on January 18, 2011, appealed the examining attorney's final refusal to register the proposed mark, CITY OF HOUSTON TEXAS and seal design, for municipal services, namely, promoting trade, commerce, economic development and tourism; city administrative services, namely, business administration and management of municipality services in International Class 35; and municipal services, namely, providing public utilities services in International Class 39. Registration was refused pursuant to Trademark Act Section 2(b), 15 U.S.C. Section 1052(b), on the ground that the proposed mark is an insignia of a municipality. The examining attorney respectfully requests that the refusal be affirmed.

**II. FACTS**

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**

**BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

---

Applicant: City of Houston

Serial No.: 77/660,948

Filing Date: February 1, 2009

Mark: CITY OF HOUSTON TEXAS

---

**APPLICANT'S REPLY BRIEF**

Ben D. Tobor  
Mark G. Chretien  
Greenberg Traurig, LLP  
1000 Louisiana Street, Suite 1700  
Houston, Texas 77021  
Telephone: 713.374.3528  
Attorneys for Applicant

The City of Houston (“Applicant”) appeals from the Final Office Action dated July 21, 2010, refusing Applicant’s U.S. Application Serial No. 77/660,948 for the mark CITY OF HOUSTON TEXAS.

Applicant filed its Appeal Brief on January 18, 2011. The Examining Attorney filed an Examining Attorney’s Appeal Brief on April 20, 2011.

This Reply Brief is being filed within twenty (20) days of the filing of the Examining Attorney’s Appeal Brief, as required under 37 CFR §2.142(b)(1).

Applicant hereby reiterates the arguments presented in its Appeal Brief. Applicant also hereby address certain additional issues raised in the Examining Attorney’s Appeal Brief.

1. The statute should not be construed to bar a government agency from registering its own insignia.

Applicant recognizes that Section 2(b) does not list, on its face, an express exception that would allow a municipality to register its own government insignia. However, it is important to note that the statute was enacted in 1905. At that time, it was unclear whether a government entity could own a trademark registration of any kind. It was almost sixty (60) years later before municipalities were deemed capable of registering their own marks. *See In re U.S. Department of the Interior*, 142 USPQ 506 (TTAB 1964) (“the granting of trademark and service mark registrations to state and governmental agencies does not appear to be contrary to the established policies of the Patent Office...”). Applicant respectfully submits that Section 2(b) be construed in this updated, broader context, whereby municipalities are understood to be proper applicants within the meaning of the Trademark Act. *Id.*

**United States Patent and Trademark Office  
Trademark Trial and Appeal Board  
P.O. Box 1451  
Alexandria, VA 22313-1451**

Date: May 9, 2011

To: Sally Shih  
Trademark Examining Attorney  
Law Office 106

From: Rochelle L Adams  
Paralegal Specialist,  
Trademark Trial and Appeal Board

Subject: Reply Brief for Application Serial No. 77660948

Applicant has filed its reply brief in the above-identified appeal which is available for viewing using TTABVue.

If the Trademark Examining Attorney is persuaded by the arguments contained in the reply brief that applicant's mark is registrable, and decides to allow the application, the Trademark Examining Attorney may approve the application for publication, or in the case of an application on the Supplemental Register, for registration. In the absence of such, the Board will go forward with the appeal and issue a decision on the merits in due course.

THIS DECISION IS A  
PRECEDENT OF THE TTAB

Mailed: January 18, 2012

UNITED STATES PATENT AND TRADEMARK OFFICE  
Trademark Trial and Appeal Board

In re City of Houston

Serial No. 77660948  
Filed February 1, 2009

Mark G. Chretien and Ben D. Tobor of Greenberg Traurig LLP  
for applicant.

Sally Shih, Examining Attorney, Law Office 106, Mary I.  
Sparrow, Managing Attorney.

Before Kuhlke, Cataldo, and Mermelstein, Administrative  
Trademark Judges.

Opinion by Mermelstein, Administrative Trademark Judge:

The City of Houston, Texas seeks registration on the  
Principal Register of the following mark:



for "municipal services, namely, promoting trade, commerce,  
economic development and tourism; city administrative  
services, namely, business administration and management of

GT GreenbergTraurig

TTAB

Mark G. Chretien  
 Tel 713.374.3528  
 Fax 713.754.7528  
 chretienm@gtlaw.com

March 16, 2012

via U.S. First Class Mail

U.S. Patent and Trademark Office  
 Trademark Trial and Appeal Board  
 P O Box 1451  
 Alexandria, VA 22313-1451

Re: U.S. Application No. 77/660,948  
 Mark: CITY OF HOUSTON TEXAS (and design)  
 Our file: 044444.115600

Dear Sir:

Pursuant to 37 C.F.R. § 2.145, 15 U.S.C. § 1071(a)(2), and U.S. Ct. of App. Fed. Cir. R. 15, enclosed please find a copy of the Notice of Appeal filed on behalf of the City of Houston in connection with the above-referenced application. We are simultaneously filing copies with the Office of the General Counsel of the U.S. Patent and Trademark Office and U.S. Court of Appeals for the Federal Circuit, as required.

We trust that the foregoing information is sufficient for your purposes; however, if you have any questions or require any further information, please do not hesitate to contact us.

Very truly yours,

GREENBERG TRAURIG, LLP



Mark G. Chretien

MGC/lbg  
 Enclosures  
 cc: Ben D. Tobor

ALBANY  
 AMSTERDAM  
 ATLANTA  
 AUSTIN  
 BOSTON  
 CHICAGO  
 DALLAS  
 DELAWARE  
 DENVER  
 FORT LAUDERDALE  
 HOUSTON  
 LAS VEGAS  
 LONDON\*  
 LOS ANGELES  
 MIAMI  
 MILAN\*\*  
 NEW JERSEY  
 NEW YORK  
 ORANGE COUNTY  
 ORLANDO  
 PALM BEACH COUNTY  
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 SILICON VALLEY  
 TALLAHASSEE  
 TAMPA  
 TYSONS CORNER  
 WASHINGTON, D.C.  
 WHITE PLAINS  
 \*OPERATES AS GREENBERG TRAURIG MAHER LLP  
 \*\*STRATEGIC ALLIANCE

HOU 407,533,039v3

GREENBERG TRAURIG, LLP ■ ATTORNEYS AT LAW ■ WWW.GTLAW.COM  
 1000 Louisiana Street ■ Suite 1700 ■ Houston, TX

U.S. Patent &amp; TM/Off/TM Mail Recd. CL #\*\*

374.3505

A243

03-19-2012



**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**

In the matter of:

Serial No.: 77/660,948

Filed: February 1, 2009

Mark: CITY OF HOUSTON TEXAS (and design)

Applicant: City of Houston

**NOTICE OF APPEAL TO THE UNITED STATES  
COURT OF APPEALS FOR THE FEDERAL CIRCUIT**

The City of Houston hereby appeals to the United States Court of Appeals for the Federal Circuit for review of the United States Patent and Trademark Office Trademark Trial and Appeal Board decision of January 18, 2012, affirming the Examining Attorney's refusal to register the above indicated mark. The decision was received on January 18, 2012. A copy of the decision being appealed is attached hereto.

Three copies of this notice are concurrently being filed with the clerk of the United States Court of Appeals for the Federal Circuit as set forth in Federal Circuit Rule 15, along with the fees specified by Federal Circuit Rule 52 and 28 U.S.C. §1913.

Respectfully submitted,

Date: 03/16/12



Mark G. Chretien  
Ben D. Tobor  
GREENBERG TRAURIG LLP  
1000 Louisiana Street, Suite 1700  
Houston, Texas 77002  
Phone: (713) 374-3528  
Attorneys for Applicant  
City of Houston

**EXPRESS MAIL NO. EM155394101US**

I hereby certify that this Notice of Appeal and a copy of the decision being appealed are being deposited with the United States Postal Service as "Express Mail Post Office to Addressee" under 37 C.F.R. 2.198 on the date indicated below and addressed to Office of the General Counsel, U.S. Patent and Trademark Office, P.O. Box 1450, Alexandria, VA 22313-1450.

3-16-2012

Date

Linda Guice

Name: Linda Guice

**EXPRESS MAIL NO. ED955706530US**

I hereby certify that three (3) copies of this Notice of Appeal, along with a copy of the decision being appealed and a check for \$450.00, are being deposited with the United States Postal Service as "Express Mail Post Office to Addressee" under 37 C.F.R. §2.198 on the date indicated below and addressed to U.S. Court of Appeals for the Federal Circuit, 717 Madison Place, NW, Rm. 401, Washington DC 20439.

3-16-2012

Date

Linda Guice

Name: Linda Guice

**CERTIFICATE OF MAILING**

I hereby certify that this Notice of Appeal and a copy of the decision being appealed are being deposited with the United States Postal Service as First Class Mail under 37 C.F.R. §2.197 on the date indicated below and addressed to U.S. Patent and Trademark Office, Trademark Trial and Appeal Board, P.O. Box 1451, Alexandria, VA 22313-1451.

3-16-2012

Date

Linda Guice

Name: Linda Guice

Respectfully submitted,

Dated: February 4, 2013

By: /s/ Mark G. Chretien

Mark G. Chretien  
Ben D. Tobor  
Anthony F. Matheny  
GREENBERG TRAURIG, LLP  
1000 Louisiana Street, Suite 1700  
Houston, Texas 77021  
Telephone: (713) 374-3528  
Facsimile: (713) 754-7528  
Attorneys for Appellant  
City of Houston

## CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of February, 2013, I electronically filed the foregoing JOINT APPENDIX with the Court's CM/ECF filing system, which will automatically send a notice of filing to the following registered user:

Ms. Christina J. Hieber  
Office of the Solicitor  
United States Patent and Trademark Office  
Mail Stop 8, PO Box 1450  
Alexandria, Virginia 22313-1450

By: /s/ Mark G. Chretien

Mark G. Chretien  
Attorney for Appellant  
City of Houston